

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AVISTA CORP.,

Employer,

v.

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 77,

Petitioner.

Case No. 19-RC-15234

**UNION'S STATEMENT IN OPPOSITION TO
EMPLOYER'S PETITION FOR REVIEW**

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INTRODUCTION

The sole issue in this case is whether central distribution dispatchers employed by Avista, Inc. (the “Employer” or “Avista”) are Section 2(11) supervisors. More specifically, the Employer’s Petition for Review is limited to the issue of whether the dispatchers “assign” work or personnel utilizing independent judgment as required by Section 2(11) of the Act. Avista Petition for Review at 1, n. 1 (“Petition”).

The Regional Director issued a lengthy, complete, and thoughtful decision, concluding that the petitioned-for dispatchers are not supervisors. The Employer raises a number of arguments, combined with numerous misstatements of the record, in an attempt to reverse the Regional Director’s Decision and Direction of Election (“DDOE”). In every way this is a run-of-the-mill case where the Employer’s position, reduced to its core, is simply that the Employer does not agree with the Regional Director’s decision. The Regional Director’s decision is cogent, rational, and well within the bounds of existing Board precedent. Regional Directors’ decisions should not be overturned without a substantial basis for doing so. There is no reason for doing so in this case. The Board should focus on the Regional Director’s decision and the very high standard for granting review, rather than allowing itself to be swayed by the Employer’s misinformation and half-truths about the record.

A prime example of these misstatements demonstrates the Employer’s willingness to say whatever it believes will persuade the Board to grant review regardless of the record. In an attempt to convince the Board that dispatchers engage in significant “prioritizing,” the Employer takes issue with the Regional Director’s conclusion “that prioritizing multiple incidents occurred only 1% of the time. (DDE at page 4)”. Avista argues that “the hearing transcript reveals that

Mr. McAllister's estimate was based upon a situation where he was controlling only one crew. (Tr. 291)". Petition at 4-5. The Employer ignores McAllister's further testimony that, even if he were controlling more crews, that number would rise to only 2-3 percent. Tr. 291.

Another example of the Employer's mischaracterization of the record appears at page 3 of the Petition. The Employer asserts that "[w]ithout citation to the record, the DDE concludes that Dispatchers cannot assign employees to areas, shifts or crews (DDE at 3 and 8)." The Employer never contradicts the Regional Director's findings – because it cannot. The record demonstrates that dispatchers, in fact, cannot assign employees to areas (TR 67, 107, 129, 221-24), shifts (TR 124, 211), or crews (TR 67, 107, 129, 222-24). While the DDOE may not contain citation to the record, that does not mean that the record fails to support the Regional Director's conclusions.¹

¹ Similarly, the Employer claims that dispatchers authorize overtime pay. Petition at 13. That is not true – a dispatcher can request that a field employee work overtime, but the choice to work is voluntary. Tr. 78, 130. "None of the field people are required to show up. That's part of the bargaining unit contract." Tr. 130. The Employer also claims that a dispatcher "thirty to forty times per year...will design and issue switching orders to crews in the field. (Tr. 259, 280)." Petition at 8. However, the Employer ignores the testimony that each of these switching orders is supposed to be reviewed by Mr. Potter, an engineer. Tr. 224, 259. Also, the Employer claims that dispatchers "have held crews over." Petition at 12, citing Tr. 262. However, the testimony cited to was actually that the dispatchers *have asked a manager* to hold crews over. Tr. 262.

Additionally, the Employer misrepresents the issue at hand, citing as support portions of the record discussing the fact that dispatchers may call in other dispatchers. Petition at 7. The issue in this case is whether the dispatchers supervise *field employees*, not one another. DDOE at 3 ("The dispatchers' alleged supervisory status rests on their role in sending field employees to trouble calls and switching orders...."); Tr. 63-64. Whether dispatchers call each other in is irrelevant – otherwise, the dispatchers would be each other's supervisors (leaving no "employees" to be supervised).

Furthermore, the Employer frequently cites to pages in the record that in no way support the statement cited. For example, the Employer claims that "[t]he Dispatcher need not secure any other supervisory approval or permission to assign responders to overtime or to call out responders from their homes in the middle of the night." Petition at 13, citing Tr. 51, 117. Page 51 nowhere mentions any of the issues discussed by the Employer. Further, page 117 contains only a discussion between the hearing officer and counsel for the Employer and Union about stipulating that the dispatchers do not perform certain tasks. *See also* Petition at 9, citing Tr. 22; Petition at 10, citing Tr. 23-26; Petition at 11, citing Tr. 269; Petition at 12, citing Tr. 49; Petition at 12, citing Tr. 294; Petition at 13, citing Tr. 53; Petition at 13, citing Tr. 31.

STATEMENT OF THE CASE

The Regional Director rationally concluded that the dispatchers are not statutory supervisors. This case arises from an attempt by a group of distribution dispatchers employed by Avista to organize for collective bargaining purposes. The Employer provides energy in the form of electricity and gas to customers in eastern Washington, Idaho, and parts of Oregon. Tr. 12-13.

The Employer's distribution dispatchers coordinate the dispatch of the Employer's field personnel, such as linemen and servicemen, to both planned and unplanned construction, maintenance, and repair for the Employer's gas and electric distribution systems. Tr. 36, 65-66. Three regions, comprised of approximately ten areas, make up the Employer's service area. Tr. 69-70.

The distribution dispatch department is comprised of ten distribution dispatch personnel, a manager, and an engineer. Tr. 9, 11. Neither the engineer, Mr. Potter, nor the manager, Mike Broemeling, is sought in the proposed unit. Id. Dispatchers are assigned to work twenty-four hours a day, seven days a week, three hundred and sixty-five days a year. Tr. 17. At any given time there are two to three dispatchers on duty; one gas dispatcher and one to two electric dispatchers. Tr. 100-01. Each dispatcher rotates through every shift and works both the gas and electric desks. Tr. 52, 101.

Dispatchers do not complete any formal training but rather learn dispatch skills "on the job" watching other dispatchers work. Tr. 150-51, 198, 240-41. Dispatchers are not required to hold any state or federal certifications. Tr. 99-100, 103, 198. Dispatchers can volunteer to take a "Switching and Tagging" class offered by represented field employees but this class is not

required. Tr. 37-38, 94, 240-41. The Employer's current dispatchers have a variety of prior work experience including: meter reader, customer service, customer design, mapping, lineman, 911 operator, and gas compliance. Tr. 42-44. There is a broad range of electrical experience amongst the Employer's dispatchers. Tr. 299.

The dispatchers' primary function is to dispatch the Employer's field personnel, such as servicemen and linemen, to various locations to work on the Employer's gas and electric distribution systems, particularly during disruptions in energy service. Tr. 20, 46, 67, 70, 186. These locations are either pre-determined by management personnel charged with planning and assigning field crews for planned work, or established by customers calling to report problems at specific locations. Tr. 70, 221-22, 224, 229-31.

Planned events such as construction, repair, or maintenance are scheduled in advance by the Employer's management personnel and communicated to the dispatchers at least a day in advance of the scheduled work. Tr. 220, 229-31. Dispatchers do not dispatch field personnel for planned work; their primary duty is dispatching for unplanned, or trouble, events. Tr. 67. When unplanned events occur in the field the Employer's customers typically call the customer service department and a "trouble ticket" is created and uploaded to a system called an "Outage Management Tool" ("OMT"). Tr. 22-24. The dispatcher receives the ticket on the OMT and dispatches field personnel to the address provided by the individual who initiated the contact. Tr. 22, 33, 70, 173.

Typically, the dispatcher dispatches one individual, a first responder or troubleman, to visit the site of the incident and assess the problem. Tr. 26, 33, 56, 70, 187-88, 193, 222-23, 238. Each area typically has one pre-assigned first responder. Tr. 223. If the problem requires more

work than the troubleman can handle, the troubleman decides what additional personnel are needed, and the dispatcher dispatches the help the field employee requests. Tr. 35, 143, 193. Most of the time, the field employee (who is at the problem site), specifies the help he needs once he arrives and assess the situation-such as a small or a large crew. Tr. 35, 143. To the extent any decisions are made with regard to what type and size of crew is needed, it is a collaborative process between the dispatcher and the field employee. Tr. 35, 40, 86, 93, 134, 143, 150-51, 177, 179, 185, 195-96.

Dispatchers also routinely assist in “switching” procedures. Switching is the sequential opening and closing of specific switches on power lines (turning power on and off) so that scheduled or unscheduled maintenance and repair can be made by field personnel. Tr. 35-36, 90. During switching, the field employees go to a specific location and open and close switches manually in a planned sequence pursuant to a “switching order,” reporting to the dispatchers by two-way radio as each step is completed. Tr. 36, 90. It is the field employees who initiate switching orders. Tr. 226. Most switching orders are designed by other groups of the Employer’s employees who draft the detailed instructions for each switching procedure. Tr. 36

Switching can also be accomplished remotely through a computer system called the supervisory control and data acquisition system (SCADA system). Tr. 15. Dispatchers are not given authority to engage in remote switching or to effect any changes to the Employer’s energy systems remotely. Tr. 61-62. Only systems operators and engineers have the authority to accomplish switching remotely. Id. Systems operators are not sought in this unit. Tr. 9.

Planned switching occurs 1-2 times per day. Tr. 66, 221. The switching sequences are designed by the three “area engineers” and/or the twelve systems operators. Tr. 60, 64, 224.

System operators are NERC certified and have the authority to remotely energize and de-energize the Employer's power systems using the Employer's SCADA system. Tr. 60, 61. Two or three times per month a dispatcher may be called upon to design a routine switching order. Tr. 37, 65, 259-61. All switching orders must be pre-approved by the dispatch engineer, Potter. Tr. 224, 259. During switching, dispatchers communicate with field personnel via radio and log the times of each switching sequence to document the order of the steps being performed by field personnel. Tr. 228.

Dispatchers also perform a common safety function of issuing "hot line holds" for field crews who are working on energized power lines. Tr. 65-66, 219-20. Hot line holds are predominantly pre-planned and dispatchers may participate in as many as twenty holds per shift. Tr. 66. Planned switching and hot line holds are generally not scheduled after hours. Tr. 100-01.

Regular business hours in the dispatch department are 6:00 a.m. to 6:00 p.m. Tr. 17-18, 68-69. During that time, approximately thirty percent of dispatchers' time is spent engaged in routine, planned activity such as switching and hot line holds. Tr. 103-04, 235. After hours, from 6:00 p.m. to 6:00 a.m., dispatchers are primarily responsible for dispatching field personnel to incidents, as little work is planned for this time period. Tr. 18. In Spokane, a night field crew is assigned to work from 3:00 p.m. to 11:00 p.m. Tr. 129-30, 242. In other areas, field personnel are called out on a volunteer basis. Tr. 106.

During day shift, dispatchers dispatch field personnel to trouble calls depending on who management has assigned to the area from where the call originates. Tr. 146, 176, 223. Dispatchers know who has been assigned to a specific geographic area because each day the supervisory personnel in charge of the field crews upload their planned work and crew

assignments, referred to as the “mark-up,” onto the Employer’s computer system. Tr. 221-22, 224. Dispatchers are not involved in scheduling field personnel. Tr. 233.

During day shift, dispatchers generally contact the general foreman (a non-represented management employee) before dispatching a crew from one location to another. Tr. 183, 251-54. The dispatcher will ask the general foreman if he or she can spare part or all of their crew prior to dispatching personnel to a new location. Id. No dispatch of personnel is necessary for planned work during the day shift because the crews have already been assigned to a location by the general foreman. Tr. 96. Day shift dispatch is generally accomplished by radio. Tr. 139.

Dispatchers dispatch both electric and gas troublemen during the day. Tr. 238. Dispatchers also dispatch pre-assigned “reconnect” personnel to reconnect customers whose power needs to be restored, usually after a customer account has been made current. Tr. 39-40, 243-44, 281-82. Reconnects are not generally assigned by dispatchers. Tr. 282.

After regular business hours, field personnel are called to volunteer for after-hour work based on the number of overtime hours they have worked, fewest first and so on. Tr. 78. This is a strictly volunteer system and is governed by the applicable collective bargaining agreement. Tr. 130. Again, field personnel are dispatched to incidents that occur in the area they have been pre-assigned to work within for call-outs. Tr. 78. As the Employer does not schedule “planned” events for after hours, the bulk of the dispatchers’ duties involve dispatching field personnel to unplanned “incidents” often related to weather. Tr. 30-31, 101. The Employer has drafted manuals detailing the process for dispatch to follow for after hours dispatches. Tr. 30.

The dispatcher is aided in dispatching personnel for electrical issues after hours by an automated computer system called ARCOS. Tr. 26-27, 77-79. The ARCOS system shows

where all servicemen (one-man crews), overhead, and underground crews are assigned and working in each of the Employer's service areas. Tr. 221-22. The Employer's ARCOS system is programmed to automatically call field personnel according to pre-determined criteria. Id. When a dispatcher needs to dispatch a troubleman to an after-hours incident, the dispatcher inputs the geographical area into the ARCOS system and the classification of the personnel needed (typically lineman/serviceman, also referred to as troubleman) and clicks on "initiate" and the system calls the field personnel, waiting four minutes between calls for a response, until a field employee accepts the call-out. Id. Field employees can ignore a call from the ARCOS system at their discretion. Tr. 106, 174.

If the ARCOS system exhausts the geographic area without finding a volunteer, the written procedure is for the dispatcher to contact the on-call supervisor from that area and let them know they have exhausted a search for personnel in their area and are moving on to another area. Tr. 248-49, 270. Then the dispatcher repeats the ARCOS process in a different geographic area. Id. The collective bargaining agreement pre-determines the order and number of field personnel that must be dispatched after hours. Tr. 70-71, 130, 148, 247-48; Er. 1, p. 24. For safety reasons, at least two field personnel are dispatched to most trouble calls after hours. Tr. 243, 245-48.

Gas dispatch is similar to electric. Dispatchers use a program called Advantax to dispatch personnel to gas trouble orders. Tr. 235. The Advantax system shows the dispatcher which gas serviceman is available in each area. Tr. 235-36, 246-47. When a gas trouble order comes in, the dispatcher dispatches the order via their computer and the gas technician receives the order on a laptop. Tr. 52-53. Dispatchers do not, however, dispatch gas crews if the

troubleman needs additional personnel at the trouble site. Tr. 108-09, 238-39. All gas crew dispatch is accomplished by a gas crew dispatcher in the Employer's gas construction group, a separate department.² Id.

If a dispatcher has more work than he can handle, he may call in an additional dispatcher. Tr. 27. If the dispatchers are busy, dispatchers can determine whether to stay after the end of their shifts. Tr. 42 Both of these decisions are voluntary. Tr. 281-84.

Normally, dispatchers operate under EOP-1, or "business as usual" or "typical" conditions. Tr. 82, 156. Two or three times a year that level is raised to EOP-2.³ Tr. 82. In an EOP-2 situation, additional personnel, such as systems operators, engineers, and supervisors are called in to assist with dispatch. Tr. 139-40, 156, 252-53, 265-66, 289. This is because those personnel are more familiar with critical information such as seniority, crew complements, and resources. Tr. 252-53. Dispatchers do not declare EOP-2 situations. Tr. 266.

With regard to the actual work performed by the Employer's field personnel, dispatchers have virtually no authority or control. Field employees are supervised by personnel in the field, such as foremen and general foremen. Tr. 67, 107, 115, 274. Dispatchers do not have the authority to assign field employees to a specific shift, i.e. night shift versus day shift, or change their shift. Tr. 124, 211. Dispatchers do not assign specific field personnel to specific work crews; that assignment is made by field personnel supervisors and recorded in the daily "mark-ups" for each area. Tr. 67, 107, 129, 222-24. Dispatchers do not evaluate the abilities of one field employee over another when dispatching field employees. Tr. 114, 252-53. Dispatchers do

² The Petitioner does not seek to include any personnel from the gas construction group in the proposed unit.

³ "EOP" stands for Emergency Operating Plan. Tr. 19. Above an EOP-2 is EOP-3. Tr. 82. Above that is what is termed a "major event" day. Id. This occurs when ten percent of Avista's customers are out of power. Id. Avista has had no major event days in the last year. Id.

not have the authority to assign field employees to an overtime shift. Tr. 124, 211, 285. Dispatchers can ask field employees to work after the end of their shift but cannot require that a field employee do so, it is the field employee who makes the ultimate decision. Id.

Dispatchers do not have the authority to require field employees to come in to work from off-duty status. Tr. 130. The call-out procedures are pre-determined by the applicable collective bargaining agreement and the Employer's policies and procedures. Tr. 70-71, 130, 148, 247-48; Er. 1, p. 24. Dispatchers do not typically determine the number of field employees they dispatch, for scheduled work that number is pre-determined and for unscheduled work the default is typically one troubleman initially and then either a "crew" which is either pre-determined by contract or specifically requested by the field employee onsite. Id.; Tr. 121-22, 143. Dispatchers are not charged with assessing safety conditions for employees in the field. Tr. 88. That is left to the field employees themselves. Tr. 85, 87-88, 121.

Dispatchers do not evaluate or review the work performed by field employees. Tr. 114, 135. Dispatchers do not have the authority to take corrective action against any other employee, including field employees. Tr. 118-19, 209-12. Dispatchers do not direct or oversee the work performed by field employees. Tr. 133, 137, 145, 255. Field employees perform the work they are trained to perform; work dispatchers are not trained to perform field work and do not train field personnel. Tr. 133, 137-38, 144-45, 298. Dispatchers are not charged with timekeeping for field employees. Tr. 127-28. Dispatchers are not held accountable for the proper performance of the tasks being performed by the field employees. Tr. 124-25, 210-11. Dispatchers cannot be disciplined for the inadequate performance of field employees. Tr. 125.

After a hearing and briefing by both parties, the Regional Director held that the dispatchers do not assign work, responsibly direct, discipline or effectively recommend discipline. To the extent that the dispatchers may do any such actions, the Regional Director held that they do not exercise independent judgment. He therefore held that they are not supervisors, and issued the DDOE.

ARGUMENT

I. REQUESTS FOR REVIEW ARE GRANTED ONLY FOR SPECIFICALLY ENUMERATED, COMPELLING REASONS.

A request for review of a Regional Director's DDOE should only be granted when "compelling reasons" exist. NLRB Rules §102.67(b). Under the Board's rules, Section § 102.67(c), a request for review "may be granted *only* upon one or more" of four enumerated grounds:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The Employer's Petition for Review is based on 102.67(c)(2) and (4). Petition at 1.

II. THE EMPLOYER'S REQUEST FOR REVIEW DOES NOT DEMONSTRATE COMPELLING REASONS TO REVERSE THE REGIONAL DIRECTOR'S DECISION.

- A. The Employer Bears The Burden Of Proving That Employees Should Be Excluded From Representation As Supervisors Because They Perform At Least One of The Statutory Functions, Exercise Independent Judgment, And Act In The Interest Of The Employer.

“Supervisors” are expressly excluded from coverage under the National Labor Relations

Act. 29 U.S.C. §152. “Supervisor” is defined by the Act as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Supreme Court recently restated its three-part test for determining when employees are supervisors under the Act in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 121 S.Ct. 1861, 149 L.Ed.2d 939 (2001):

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.”

To exercise “independent judgment,” an individual must, at a minimum, act or effectively recommend action, free of the control of others, and form an opinion or evaluation by discerning and comparing data. Oakwood Healthcare, Inc., 348 NLRB 686, 693 (2006). Judgment of a “merely routine or clerical nature” is not enough. Id. Nor is judgment independent if it is dictated or controlled by detailed instruction, whether set forth in company policies or rules, in a collective bargaining agreement, or in verbal instructions. Id.

The party asserting supervisory status bears the burden of proof. Kentucky River, 121 U.S. at 711-12. The Board is understandably cautious in finding supervisory status because supervisors do not receive the protections of the Act. Vencor Hospital, 328 NLRB 1136, 1138 (1999). In approving this approach, the D.C. Circuit explained its rationale in East Village Nursing & Rehabilitation Center v. NLRB, 165 F.3d 960, 963 (D.C. Cir. 1999):

[W]hen a worker is found to be a “supervisor” within the meaning of the Act, she is excluded from the NLRB’s collective bargaining protections. In light of this, the Board must guard to avoid unnecessarily stripping workers of their organizational rights. Because of the serious consequences of an erroneous determination of supervisory status, particular caution is warranted before concluding that a worker is a supervisor despite the fact that the purported supervisory status has not been exercised.

The parties stipulated that the issue before the Regional Director was whether or not the Employer’s distribution dispatch employees possess the Section 2(11) statutory supervisory authority to assign, responsibly direct, or effectively recommend discipline for the Employer’s field personnel. Tr. 116-18. After the hearing, the Employer abandoned the “effectively recommend discipline” issue, and in the Petition for Review, it abandoned the “responsibly direct” issue.⁴ Accordingly, the only issue before the Board is whether the Director correctly determined that the employees lack the authority to assign work using independent judgment.

B. The Employer Points to No Substantial Factual Issues Requiring Reversal of the DDOE. The Regional Director’s Determination That Distribution Dispatchers Were Not Supervisors Was Premised On Record Facts And Was Not Clearly Erroneous.

1. The Employer’s Asserted Factual Issues Are Meritless.

The Employer initially argues that the Regional Director made a “general factual error” because his decision “minimizes the significance of the lack of supervision by quoting Mr.

⁴ Petition at 1, n.1

Broemeling's statement that he was always on call." Petition at 3. The Employer does not argue that the Regional Director misinterpreted the statement; rather, it argues that the Regional Director gave that statement too much weight because Mr. Broemeling had only been called twice in four months. *Id.* That he was only called twice does not contradict that he was on call 24 hours a day. Tr. 143. Avista's complaint about the weight given to the statement does not show that the Regional Director's action was "clearly erroneous."⁵

Avista next asserts that the Regional Director made several errors regarding the "assign" issue. Petition at 3. The Employer complains that the Regional Director's failure to cite to the record for the proposition that "Dispatchers cannot assign employees to areas, shifts or crews (DDE at 3 and 8)," is error. *See* discussion, *infra* p.3 (*citing* TR 67, 107, 124, 129, 211, 221-24). Again, the Employer never contradicts those findings, and the findings are amply supported by the record. *Id.* The Employer also attacks the Regional Director's finding that "the field employee's day-to-day assignments are determined by operations department personnel. (DDE at page 3)." *Id.* That finding has substantial support in the record. Tr. 67, 107, 129, 222-24.⁶

The Employer next asserts that the Regional Director made numerous factual errors with regard to the issue of "exercise of independent judgment." Petition at 4. First, the Employer cites the following testimony of dispatcher McAllister about criticism dispatchers may receive: "maybe you should've sent a crew in another direction on an outage that had been there for hours longer than the one you set them on, but through the chaos it's difficult to make those right

⁵ Additionally, whether or not Mr. Broemeling was on call is irrelevant to whether the dispatchers are supervisors. The key issue is the dispatchers' relationship to field employees, not the dispatchers' relationship to their own supervisor.

⁶ Avista also claims that the Director overlooked a response to a question by the hearing officer. Petition at 3. The testimony cited merely involves general testimony about dispatching crews. Tr. 296-97. The Employer does not explain how this "fact" is substantial, or how it is clearly erroneous. Moreover, the response was in answer to a hypothetical fact pattern.

decisions every time. (Tr. 266-267).” Petition at 4. Avista does not explain how this is a substantial factual issue, or how it was clearly erroneous. Regardless, that a dispatcher may have received criticism for a particular dispatch does not show that the dispatcher exercised independent judgment. The record shows that the dispatching process is a collaborative effort between the dispatcher and field employees. Tr. 35, 40, 86, 93, 134, 143, 150-51, 177, 179, 185, 195-96.

Second, the Employer claims that the Regional Director “erroneously finds that Avista failed to establish that dispatchers considered the availability and capability of complex equipment or skill.” Petition at 4. Avista claims that the finding “overlooks the testimony of Mr. McAllister, who testified...that the type of equipment being utilized by a particular crew was a factor in the decision on who to call out to a given incident (Tr. 294-95).” Id. The Employer’s citation, however, misrepresents the testimony.

McAllister testified that it is the field employees – “the eyes in the field” – that explain what equipment is available at a location, and what more is required. Tr. 295. As he testified, “[i]t’s hard sitting in a dispatch chair to know what material, what equipment and what personnel is required to do the job.” Id. This testimony reinforces the Regional Director’s finding that dispatching is a collaborative job, and that dispatchers rely heavily upon those in the field.

Third, the Employer asserts that the Regional Director’s DDOE erroneously “contains a factual finding that the employer presented no examples of incidents where a Dispatcher overruled or modified a first responder’s request for additional help.” Petition at 4. The Employer claims this finding is erroneous because McAllister testified “that he can pull a crew off of the job and leave the job as it is on an event by event basis. (Tr. 294).” Id. The

Employer's own citation does not contradict the Regional Director's finding. McAllister's testimony that he has some ability to pull a crew off a job does not provide *an example* of such an incident, which is precisely what the Regional Director found lacking. Moreover, the record establishes that the general protocol is to contact the general foreman before moving a crew.⁷ Tr. 183, 251-54.

Fourth, as described above (*see* discussion, *infra* pps. 1-2) the Employer takes issue with the Regional Director's conclusion "that prioritizing multiple incidents occurred only 1% of the time. (DDE at page 4)." Petition at 4. Avista argues that "the hearing transcript reveals that Mr. McAllister's estimate was based upon a situation where he was controlling only one crew. (Tr. 291)". *Id.* at 4-5. The Employer ignores McAllister's further testimony that, if he were controlling more crews, that number would only rise to 2-3 percent. Tr. 291. Whether the percentage is one percent or three percent, such time spent prioritizing is *de minimis*, and does not show that the dispatchers "assign" work a "regular and substantial" amount of time. *Cf. Oakwood Healthcare*, 348 NLRB at 694.

Fifth, the Employer asserts that the Regional Director's finding that "decisions to reassign field employees are made in conjunction with the general foreman of the affected field employees where possible" is contradicted by one sentence in Mr. McAllister's testimony. Petition at 5. However, the record as a whole confirms, time and again, that the process of moving and assigning field employees is collaborative. Tr. 35, 40, 86, 93, 134, 143, 150-51, 177, 179, 185, 195-96. A single citation does not refute the overwhelming weight of the

⁷ This only applies to day shift. After regular business hours, field personnel are called to volunteer for after-hour work based on the number of overtime hours they have worked, fewest first and so on. Tr. 78. Thus, dispatchers do not move crews at night.

evidence, and certainly does not mean that the Regional Director's finding was clearly erroneous.

Sixth, the Employer asserts that "[t]he record reflects that the Dispatcher will utilize his or her discretion to bypass the automated call out system when it is necessary to get someone [sic] an incident immediately (Tr. 250)." Petition at 5. Again, the Employer ignores relevant testimony. McAllister further testified that "we only do that when the information from the field warrants that this is a dangerous situation that needs immediate attention...." Tr. 250. This additional testimony, ignored by the Employer, again reinforces the fact that dispatching is a collaborative process.

Seventh, the Employer asserts that "McAllister acknowledged that Dispatchers assigned employees when he stated that he would track down another serviceman or get someone else to fill a position (Tr. 276 and 277)." Petition at 5. That assertion is conclusory. Moreover, McAllister testified about what he does when a person included in a switching order is unavailable when the crew performs the switching order. Tr. 276. Thus, McAllister merely explained that a dispatcher assists the crew in finding a replacement so that the crew can still complete the switching order.

Eighth, the Employer asserts that "[t]he record is clear that the Dispatchers also select the classification of employees that are necessary to respond to the incident. (Tr. 250)". Petition at 5. While Mr. McAllister testified that people are called out by classification (Tr. 250), that was after he explained that the necessary classifications are identified by those in the field, and that the determination as to who is sent out is governed by the field employees' collective bargaining agreement. Tr. 248, 250. Moreover, the dispatcher usually sends out a "first responder" (Tr. 26,

33, 56, 70, 187-88, 193, 222-23, 238), who then informs the dispatcher if other personnel are needed. Tr. 35, 143, 193.

Ninth, the Employer asserts that the Regional Director erred by holding that an emergency switching procedure was a collaborative process because the testimony “shows that Mr. McAllister was directing the activity....” Petition at 5. In fact, the testimony showed that the foreman in the field “noticed that there was an air switch just one span away. We discussed – he wanted me to look at the map.” Tr. 260. McAllister looked at the map, and he and the foreman “discussed on the phone that it might be easier, much easier for the crew to replace this pole if the line were dead.” *Id.* Ultimately, McAllister drafted a switching order and issued a clearance, but only *after* working with the foreman in the field.

2. The Regional Director’s Factual Findings Are Amply Supported By Record Facts.

The Regional Director found that the dispatchers do not exercise supervisory powers, with regard to assigning work, based on his factual finding related to five main issues. DDOE at 9-10. First, he found that dispatchers do not sufficiently prioritize incidents to be considered supervisors. DDOE at 9. When prioritizing incidents, “dispatchers follow the Employer’s guidelines.” *Id.* That finding is supported by significant testimony. Tr. 30, 32, 38, 55. Also, prioritization normally takes only 1% of the time of a dispatcher. DDOE at 9. That finding is directly supported by McAllister’s testimony (Tr. 291), and shows that such prioritization is not a “regular and substantial” part of a dispatcher’s work time. Oakwood Healthcare, 348 NLRB at 694.

Second, with regard to dispatching first responders, “the identity of the first responder is usually predetermined by a foreman or manager (or the collective-bargaining agreement).”

DDOE at 9. Again, the record strongly supports these findings. Tr. 70-71, 130, 146, 148, 176, 221-22, 223-24, 247-48; Er. 1, p. 24. As noted throughout the record, decisions in this area are collaborative, and based on the discussions between the field employees and dispatcher. Tr. 35, 40, 86, 93, 134, 143, 150-51, 177, 179, 185, 195-96.

Third, the Regional Director found that “where employees must be called-in, dispatchers operate pursuant to well-established call-in procedures which mandate that the employees with the least amount of overtime be given the first opportunity for such work and, in executing the call-in, dispatchers use an automated process that selects employees by predetermined criteria (location, classification, and overtime hours).” DDOE at 9. The record firmly supports these facts. Tr. 70-71, 130, 148, 247-48; Er. 1, p. 24.

Fourth, the Regional Director properly found that “there is no evidence that dispatchers possess authority to order mandatory overtime.” DDOE at 10. Dispatchers may “request” that an individual work overtime, but cannot mandate it. Tr. 78, 130.

Fifth, the Regional Director found that the dispatchers do not work unsupervised for large blocks of time. DDOE at 10. As he noted, Broemeling is always on call. *Id.*; Tr. 143. Furthermore, someone above the dispatchers is always available because the dispatchers cannot declare an EOP Level 2. DDOE at 10; Tr. 266.

C. This Case Does Not Present Compelling Reasons For Reconsideration Of An Important National Labor Relations Board Rule Because The “Rule” At Issue Remains Good Law And, More Importantly, The Regional Director’s Decision Was Based On The Reasoning Of Oakwood Healthcare.

1. The Regional Director Based His Decision On Oakwood Healthcare, Not On Mississippi Power. Accordingly, Whether That Case Remains Viable Is Irrelevant To The Decision Directing Election.

The Employer argues that the Board should follow Big Rivers Electric Corp., 266 NLRB 380, and the dissent in Mississippi Power & Light Co., 328 NLRB 965 (1999). Petition at 15-16. According to Avista, the “real issue” in this case is whether Mississippi Power “remains viable law.” *Id.* at 2. The Employer’s argument is untenable.

Although the Regional Director discussed Mississippi Power, he relied primarily on Oakwood Healthcare to reach his decision. DDOE at 12 (“In any event, I rely primarily on Oakwood Healthcare and its progeny”). Thus, the vast majority of the Regional Director’s analysis is devoted to Oakwood Healthcare. See DDOE at 7-11. The Regional Director discussed Mississippi Power only to buttress the conclusion he had already reached: that under Oakwood Healthcare, the dispatchers are not supervisors. See DDOE at 12 (“The standard for supervisory status set forth in Oakwood Healthcare...represents critical extant Board law on the indicia of supervisory authority at issue in the instant case. Regardless, Mississippi Power supports the result reached herein”). Thus, whether Mississippi Power remains viable law is irrelevant, and need not be decided by the Board in this case.

Even if the Board were to return to the holding in Big River, it would not affect this case. In Big River, the Board held that the dispatchers at issue were supervisors because they responsibly directed employees. 266 NLRB at 382. The Employer acknowledges that Big River was a “responsibly direct” case. Petition at 15. However, the Employer has abandoned its

theory that these dispatchers “responsibly direct,” and has instead argued solely that they are supervisors based on their purported ability to “assign.” Petition at 1, n.1. Thus, the Employer’s Petition demonstrates that Big River is irrelevant to this case.

Furthermore, should the Board overrule Mississippi Power, it would still have to apply the Oakwood Healthcare factors to determine the supervisory status of the dispatchers at issue. “[T]he Board examines the facts of each case to decide whether an alleged supervisor possesses and exercises supervisory authority within the meaning of Section 2(11) of the Act.” Mississippi Power, 328 NLRB at 969. *See also* Marquette Transportation, 346 NLRB 543, 545 (2006) (“The issue of supervisory status is to be decided on a case-by-case basis”). The Board does not follow hard and fast rules mandating that certain positions, solely by virtue of their titles, are supervisory. The dispatchers’ supervisory status in this case, as in all cases, must be determined by the factors in Oakwood Healthcare. As the Regional Director demonstrated, applying those factors shows that these dispatchers are not supervisors.

2. Examining The Oakwood Healthcare Factors, As The Regional Director Did, Shows That The Employer Has Not Proven That The Employees At Issue Assign Work.

In Oakwood Healthcare, the Board construed the term “assign” “to refer to the Act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee.” 348 NLRB at 689. The Board held the term did not encompass “choosing the order in which the employee will perform a discrete task” or “ad hoc instruction that the employee perform a discrete task.”

- a. Dispatchers do not assign work to other employees and do not use independent judgment related to assignment.

The Board construes “assign” to refer to the giving [of] significant overall duties, i.e., tasks, to an employee.” Oakwood Healthcare, 348 NLRB at 689. In addition, assignment also includes “designating an employee to a place (such as a location, department or wing), [or] appointing an employee to a time (such as a shift or overtime period).” Id. As we next see, the dispatchers at issue do not “assign” work consistent with the definition set out in Oakwood Healthcare.

- b. Dispatchers do not assign significant overall duties to field employees or any other employees.

Dispatchers typically work under EOP-1 (“business as usual” or “typical”) conditions. Tr. 82, 156. Moreover, many of their duties involve assisting in work pre-assigned by field supervisors, such as switching and hot line holds, that do not involve any dispatching. Tr. 70, 220-22, 224, 229-31. The Employer, however, predictably focused its inquiry at hearing on the exceptions to the general rule that the dispatchers’ job functions are typically routine in nature (as evidenced by dispatcher McAllister’s testimony that only 1% of his work time is spent prioritizing the dispatch of field personnel, Tr. 287). Within the foregoing context, the Petitioner addresses the issues of assignment and responsible direction as follows.

As the title implies, a dispatcher’s primary responsibility is to send trained field employees to those places where the field employees’ skills and training are needed. Typically, this involves sending a first responder, or troubleman, to an area where a customer has reported some type of problem with either gas or electric service. Tr. 20, 26, 33, 46, 56, 67, 70, 186-88, 193, 222-23, 238. It is also the case that when a dispatch is made, the dispatcher knows little to

nothing about the actual problem that the field employee will encounter upon arrival at a location or what equipment the field employee will need. Tr. 295. With regard to unplanned, unscheduled “incidents” the data available is generally limited to what the customer has reported to the Employer’s customer service personnel and some general information about the nature of the problem (such as whether it’s a transformer incident or a service point incident). Tr. 231. It is only after the first responder arrives at the scene and evaluates the situation that the true nature of the incident becomes apparent.

Accordingly, the dispatcher does not generally know precisely what the field employee will be doing at the location of the dispatch nor how long the field employee will be engaged at the location of the dispatch. Similarly, the dispatcher does not know whether the field employee will work on the problem alone or request additional field personnel to assist in any maintenance or repairs.

To the extent the dispatcher is charged with assisting the field employee to troubleshoot the problem, that role was described repeatedly at hearing as “collaborative.” Tr. 35, 40, 86, 134, 143, 150-52, 185, 195-96. While the dispatchers and field personnel may work together to decide a particular course of action, the dispatcher does not have the ultimate authority to insist that a field employee perform a specific task or function. Tr. 137, 255.

A party seeking to establish supervisory authority in an individual or group of individuals must show that the putative supervisor has the ability to require that certain action be taken; supervisory authority is not established where the putative supervisor merely has the ability to request that a certain action be taken. Golden Crest, 348 NLRB at 729. Here, the dispatcher’s role is limited to dispatching personnel to investigate and repair reported problems. The

dispatcher is not responsible for assigning work related to the actual repairs in the field. It cannot be said that the dispatcher's duty of sending field employees to the area where their tasks will be performed amounts to the assignment of significant overall duties.

- c. Dispatchers do not assign field employees to work in a specific geographic location. To the extent dispatchers dispatch field employees to addresses within the field employees' assigned geographic location, such assignment is routine.

The Employer has approximately ten service areas in three regions. Tr. 69-70. Dispatchers do not assign field personnel to their geographic work area. Tr. 67, 107, 129, 221-24. On day shift, field personnel are assigned work by their supervisors on a "mark-up." Id. These assignments are uploaded to the Employer's ARCOS system and dispatchers can determine which personnel are assigned to which area by reviewing the assignments on ARCOS. Tr. 251-52.

To the extent dispatchers "assign" field personnel to any specific location, it is to a location where trouble has been reported within the field employees' assigned geographic area. This type of "assignment" requires a de minimis amount of judgment at best. Obviously, dispatchers dispatch field personnel to areas where trouble has been reported. This amounts to nothing more than taking information received from a third party and relaying it to the field personnel so that reported "incidents" can be investigated by field employees. This type of assignment is routine. In the absence of a request from field supervisors or the Employer's customers for a dispatcher to dispatch field personnel to a specific location, no dispatch occurs.

While dispatchers literally dispatch field employees to specific locations, this type of "assignment" is routine and does not require the use of independent judgment beyond the basic

decision to dispatch personnel to a location where trouble has been reported or work has been previously scheduled. The “designation” to a place is accomplished by the field employees’ supervisors who assign them to a particular geographic area within the Employer’s service area. Dispatchers are simply a conduit for relaying to the field employees where to report within their designated work area.

d. Dispatchers do not assign field employees with regard to time.

Dispatchers do not “assign” because they do not have authority to “require” field employees to come in early, work overtime, or change work assignment. Golden Crest, 348 NLRB at 729. The record shows that:

- Dispatchers do not have the authority to assign field employees to a specific shift, i.e. night shift versus day shift or change their shift (Tr. 124, 211);
- Dispatchers do not have the authority to assign field employees to an overtime shift (Tr. 124, 211, 285);
- Dispatchers do not have the authority to require field employees to come in to work from off-duty status (Tr. 130);
- The call-out procedures for overtime are all pre-determined by the applicable collective bargaining agreement and the Employer’s policies and procedures (Tr. 70-71, 130, 148, 247-48; Er. 1, p. 24);
- It is the general foreman’s responsibility, not the dispatchers’, to hold a crew over if work requires it (Tr. 284); and
- Dispatchers do not move field crews off of unfinished planned work to respond to a trouble call, that is the general foreman’s responsibility. Tr. 253-54.

Dispatchers are simply not involved in the scheduling of field employees. Field employees are supervised by personnel in the field, such as foremen and general foremen, who make the types of scheduling decisions that typify supervisory authority. Tr. 67, 107, 115, 274. Those decisions are based on the field supervisor’s expertise, informed in large part by the collective bargaining agreement covering field employees. The Employer has not proven that

dispatchers exercise the type of control over field employees with regard to when and if they work necessary to establish indicia of supervisory status.

3. Even If Dispatchers Engage Infrequently In Putative Supervisory Functions, The Time Spent Is De Minimis, Rather Than Regular And Substantial.

Even if the Board concludes that dispatchers spend some time engaged in putative supervisory activity, dispatchers do not spend a regular and substantial part of their work time engaged in such activity. In Oakwood Healthcare, the Board stated that to establish supervisory status the employer must prove that the employee spends a regular and substantial part of work time performing supervisory functions according to a pattern or schedule rather than merely sporadic substitution. 348 NLRB at 11. The Board concluded that approximately 10-15 percent of work time satisfied the substantiality requirement. Id.

In certain situations the responsibilities of dispatchers are increased. The hearing witnesses described hypothetical situations where a dispatcher's routine workday is interrupted by weather or emergencies which require a higher number of dispatches to affected areas. However, those occasions are relatively rare and when they occur extra non-dispatch personnel are called in to assist with the dispatch process.

Normally, dispatchers operate under EOP-1, or "business as usual" or "typical" conditions. Tr. 82, 156. Two or three times a year that level is raised to EOP-2.⁸ Tr. 82. In an EOP-2 situation, additional personnel, such as systems operators, engineers, and supervisors are called in to assist with dispatch. Tr. 139-40, 156, 252-53, 265-66, 289. This is because those personnel are more familiar with critical information such as seniority, crew complements, and

⁸ When ten percent of Avista's customers are out of power, that is considered a "major event" day. Tr. 82. Avista has had no major event days in the last year. Id.

resources. Tr. 252-53. It follows that to the extent dispatchers are put in situations where the amount of dispatches may require “prioritization,” those events are rare and the dispatcher’s decisions are supported by, and supplanted by, other personnel, including supervisory personnel.

Dispatcher McAllister testified that it is very rare that circumstances require a dispatcher to make meaningful choices between one course of action over another. The great majority of the time the dispatcher is simply dispatching pre-assigned personnel within a specific area to locations where their skills and expertise are required, generally in chronological order. Tr. 252. The Employer certainly has not established that dispatchers spend 10-15 percent of their work day engaged in activities meeting the Board’s definition of “assign” and “responsibly direct.” *Cf. Oakwood Healthcare*, 348 NLRB at 694. In the absence of such evidence, the Employer cannot meet its burden of proof.

To illustrate the Employer’s failure of its burden, a review of Employer Exhibit 4 is instructive. Employer Exhibit 4 relates to a series of events on August 20 and 21. The exhibit purports to show that thirty-five lightning incidents were reported in a twenty-four hour period. *Id.* at 3. Notably, the Employer did not follow this exhibit up with any direct testimony from any of the dispatchers involved demonstrating how the event resulted in any “prioritizing.” In fact, it could just as readily be assumed that one lightning strike hit one neighborhood and thirty-five customers called in to report the same general power outage. This scenario, referred to as “rolling up” of incidents, does not mean that any more than one dispatch to the general area was necessary. Tr. 187, 290. The Employer’s implicit suggestion that Exhibit 4 indicates that dispatch department had to “prioritize” thirty-five incidents overlooks 1) that there were at least two dispatchers on duty that evening to share the work, and 2) dispatchers do not dispatch field

personnel on a 1:1 ratio with incidents because one incident might result in numerous separate reports from customers.

Because the Employer has the burden of proof, it would have been more instructive for it to present evidence of how many dispatches each dispatcher made that evening, whether any dispatcher moved personnel off one incident to another before the first incident was resolved,⁹ or even, minimally, how many dispatches were made to incidents that were reported after incidents that did not receive “priority” dispatch, to truly demonstrate prioritizing. Instead, the Employer relies on a snapshot of one twenty-four hour period that does not answer any of these relevant questions.

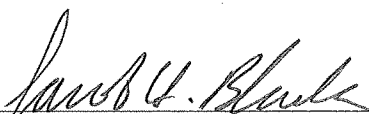
The Employer must do more than rely on mere inferences and conclusory statements; it must provide detailed, specific evidence to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991). No such evidence was presented here; accordingly the Employer has failed to meet its burden of proving the supervisory authority of the employees at issue.

⁹ Even if dispatchers occasionally dispatch crews from one location to another before the first task is complete, the Employer did not present evidence that this occurs very often. After Oakwood Healthcare, the Board confirmed that the occasional act of switching tasks among employees to finish projects or achieve production goals is more like ad hoc instructions that an employee perform a certain task and does not fall within the assignment category. Croft Metals, 348 NLRB 717. A dispatcher’s ad hoc instruction that a field employee perform the discrete task of going to a particular place so that they can perform their job is not an assignment.

CONCLUSION

The record plainly demonstrates that the Employer's dispatchers are not statutory supervisors as defined in Kentucky River and its progeny because the distribution dispatchers at issue do not assign work to any other groups of employees. The Regional Director's Direction of Election should be affirmed.

DATED this 25th day of September, 2009.



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CERTIFICATE OF SERVICE

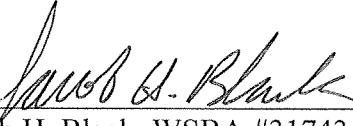
I hereby certify that on this 25th day of September, 2009, I caused the original of the foregoing **UNION'S STATEMENT IN OPPOSITION TO EMPLOYER'S PETITION FOR REVIEW** to be filed electronically through the NLRB's website at www.nlr.gov, with:

Executive Secretary
National Labor Relations Board
1099 14th Street Northwest
Washington, D.C. 20570

And true and correct copies of the same to be sent via e-mail and first class mail, postage prepaid, to:

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